TETUAN J & S HOLDINGS SDN BHD

v.

A KARIM HASAN & ANOR

HIGH COURT MALAYA, TEMERLOH
VT SINGHAM JC
[CIVIL APPEAL NO: 11-40-1999]
15 AUGUST 2000

CIVIL PROCEDURE: *Appeal – Decision dismissing preliminary objection – Whether judgment final or interlocutory – Whether finally dispose rights of parties - Subordinate Court Rules 1980, O 49 r 6(1) - Courts of Judicature Act 1964, s 3*

CIVIL PROCEDURE: *Res Judicata – Nature and scope of doctrine – Evidence on merits was not heard – Whether can raise issue of limitation already raised as preliminary objection as part of defence at trial*

The plaintiff commenced an action against the defendant for late delivery. The counsel for the defendants' raised a preliminary objection that the claim was statute-barred under s 6(1) Limitation Act 1953. The magistrate dismissed the preliminary objection. Aggrieved, the defendants lodged an appeal to the High Court. When the matter came up before the High Court, a question was raised as to whether an appeal against the decision dismissing a preliminary objection should come before the High Court.

Held:

[1] The decision of the magistrate on the preliminary objection was not a final decision that finally disposed the rights of parties within the meaning of the word "decision" in O 49 r 6(1) Subordinate Courts Rules 1980 read together with s 3 Courts of Judicature Act 1964.

[2] The doctrine of *res judicata* did not apply against the defendants as the magistrate had not heard the evidence on merits and thus the defendants were entitled to raise once again the plea of limitation as part of the defendants' case during the trial.

[Appeal dismissed.]

Case(s) referred to:
Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 ***(foll)***
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1996] 2 MLJ 57 ***(dist)***
Hook v. Administrator-General of Bengal & Ors LR 48 IA 187 ***(refd)***
Louis Dreyfus v. Aruna Chalayya LR 58 AI 381 ***(refd)***

Peareth v. Marriott [1883] 22 Ch D 182 ***(refd)***
Ratnam v. Cumarasamy & Anor [1962] 28 MLJ 330 ***(foll)***
Re Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v. Tan Yew Ghee & Another [1936] MLJ 141 ***(refd)***
Saad Abas & Anor v. PP [1998] 4 CLJ 575 ***(foll)***
Watson v. Ridwekk [1879] 11 Ch D 150 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 26(b)
Courts of Judicature Act 1964, ss. 3, 4, 27, 29
Limitation Act 1953, s. 6(1)
Subordinate Courts Rules 1980, O. 49 r. 6(1)

For the appellants - YW Mak; M/s Yeong & Mak
For the respondent - M Ramachelvam (G Sivakumar with him); M/s Zuki, Gandhi & Amin

Reported by Izzaty Izzuddin

JUDGMENT

VT Singham JC:

Appeal

This is an appeal by the defendants against the decision of the learned magistrate, Magistrate's Court, Temerloh given on 20 February 1999 wherein the preliminary objection of the defendants' counsel was overruled. In this appeal, the appellants and the respondents are referred to as the defendants and the plaintiffs respectively.

Plaintiffs' Claim

The plaintiffs' claim against the defendants is for damages for breach of the terms of the sale and purchase agreement dated 14 November 1988, particularly, cl. 18(1) namely, for the late delivery of vacant possession of a single storey terrace house at the price of RM38,000 which was part of a housing project. The plaintiffs alleged that pursuant to the terms of the said agreement, the defendants had agreed to deliver vacant possession of the said house to the plaintiffs within 24 months from the date of signing the agreement by both the parties, that was, by 13 November 1990 but vacant possession of the said house was only delivered on 31 May 1996. The plaintiffs' claim for damages was for the period from 13 November 1990 till 21 May 1996 (five years ten months) calculated at the rate of 10% per annum of the purchase price of RM38,000 which amounted to RM20,983.27, interest and costs.

Statement Of Defence

The defendants by their statement of defence, pleaded *inter alia*, that the defendants' management was taken over by a new company and since then, the purchasers of the housing project including the plaintiffs, had agreed and gave an undertaking during the negotiations between the purchasers and the new management that the purchasers will allow an extension of time to the new management to complete the project and will forgo their rights under cl. 18(1) and 18(2) of the said agreement. Consequently, the defendants pleaded that the plaintiffs were estopped from commencing the action against them. The defendants also pleaded that since the action by the plaintiffs was not commenced within six years, the action was statute-barred under the provisions of s. 6(1) of the Limitation Act 1953. Section 6(1) reads as follows:

Limitation

> 6(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
>
> (a) actions founded on a contract or on tort;
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> (b) actions to enforce a recognisance;
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> (c) actions to enforce an award;
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> (d) actions to recover any sum recoverable by virtue of any written law other that a penalty or forfeiture or of a sum by way of penalty or forfeiture.

Preliminary Objection

However, on the date fixed for hearing of the civil action, the defendants' counsel raised a preliminary objection that the plaintiffs claim was statute-barred under s. 6(1) of the Limitation Act 1953. On hearing counsels for both parties, the learned magistrate overruled the preliminary objection and fixed the case for hearing on 28 May 1999.

Notice Of Appeal

The defendants being dissatisfied with the decision of the learned magistrate on the preliminary objection filed a notice of appeal on 4 March 1999 at the Magistrate's Court, Temerloh to appeal to the High Court.

However, before proceeding further, it is quite relevant to set out the chronology of events at the Magistrate's Court, Temerloh which will become apparent at the later part of this judgment and which are as follows:

Chronology Of Events At Magistrate's Court

Date	
11 August 1998	case came up for mention and another date was fixed for further mention to 25 August 1998 for defendants to file statement of defence
25 August 1998	case was fixed for further mention on 29 September 1998 for bundle of documents to be filed
29 September 1998	case was fixed for further mention to 13 October 1998 for bundle of documents to be filed
13 October 1998	case we fixed for hearing on 26 January 1999
26 January 1999	defendants' counsel raised preliminary objection and case was postponed to 12 February 1999 for hearing of the preliminary objection
12 February 1999	preliminary objection was heard and case adjourned to 20 February 1999 for decision
20 February 1999	preliminary objection was overruled and case was fixed for hearing on 28 May 1999
28 May 1999	defendants' counsel applied for adjournment pending the outcome of the appeal to the High Court against the decision on the preliminary objection. Case was adjourned to 25 June 1999 for mention and after several applications for the case to be adjourned since 25 June 1999 pending the outcome of the appeal to the High Court, the case was finally fixed on 13 September 2000 for hearing as the magistrate was informed that the appeal had been fixed for hearing on 10 August 2000.
	In the meantime, the summons was struck out on 10 March 2000 when the plaintiffs and their counsel were not present and eventually the summons was reinstated on 2 June 2000 pursuant to an application dated 23 March 2000.

Reply By Plaintiffs' Counsel To The Preliminary Objection

In reply to the preliminary objection raised by the defendants' counsels, the plaintiffs' counsel produced a letter dated 16 October 1995 from the defendants to the plaintiffs wherein the defendants had acknowledged the breach of the said agreement by the defendants and had asked for extension of time till the end of December 1995 to settle the plaintiffs' claim. Therefore, the plaintiffs' counsel contended that the time for the purpose of the claim starts only from 16 October 1995 and not 13 November 1990. The plaintiffs' counsel further contended that the parties are bound by s. 26(b) of the Contracts Act 1950 which reads:

> An agreement made without considerations is void, unless:
>
> (b) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do.

Further Reply By Defendants' Counsel

In reply, the defendants' counsel further submitted that the letter dated 16 October 1995 was not the basis of the plaintiffs' claim against the defendants as the claim was based on the alleged breach of the said agreement and the said letter should be disregarded.

Decision Of Magistrate On Preliminary Objection

The learned magistrate overruled the preliminary objection which was raised on behalf of the defendants and fixed a date for the hearing of the civil action to 28 May 1999. Hence, this appeal by the defendants.

Direction Of High Court

On 5 June 2000, when this appeal came up for hearing before this court, both counsels were directed by this court to carry out research on the law with the view to address the court whether an appeal shall lie to the High Court, against the decision of the learned magistrate on a preliminary objection and fixed the hearing of the appeal to 10 August 2000.

Submissions On Appeal By Defendants' Counsel

On 10 August 2000, counsel for the defendants submitted as follows:

[1] the defendants have the right of appeal against the decision on the preliminary objection and referred to O. 49 r. 6(1) of the Subordinate Courts Rules 1980, which reads as follows:

Order 49 r. 6(1) of the Subordinate Courts Rules 1980 reads:

> 6(1) Notwithstanding anything contained in this Order, an appeal shall lie to a Judge in Chambers from any decision made by the Court other than a decision made after trial.

[2] if the decision of the learned magistrate is not set aside, the defendants will be prejudiced as they will be caught by the doctrine of *res judicata* and may not be able to raise the defence of limitation during the trial of the civil action. In support of his argument, he relied on the decision in *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1996] 2 MLJ 57 at p. 58 and referred to the held (1) of the case which reads as follows:

> Once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened. Although the first decision was made on an interlocutory matter which was purely procedural in nature, it was nevertheless binding on the court and on all parties to the *lis* until its reversal on appeal. The decision of the judge overruling the respondent's preliminary objection rendered the point taken *res judicata.*

Learned counsel for the defendants also referred to two other passage in *Hartecon JV Sdn Bhd & Anor* at p. 65 which reads "In our judgment the decision of the learned judge overruling the respondent's preliminary objection rendered the point taken *res judicata*" and at p. 66 which reads that "A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. (See *Peareth v. Marriott* [1883] 22 Ch D 182, *Hook v. Administrator-General of Bengal & Ors* LR 48 IA 187 and *Re Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v. Tan Yew Ghee and Another* [1936] MLJ 141 at pp 147-151). Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication. (See *Louis Dreyfus v. Aruna Chalayya* LR 58 AI 381)."

Learned counsel for the defendants therefore contended that the decision of the learned magistrate on the preliminary objection is appealable and expressed the defendants' fear that the learned magistrate may not allow the defendants to once again raise that defence of limitation during the trial.

Submissions On Appeal Of Plaintiffs' Counsel

On the other hand, the plaintiffs' counsel submitted as follows:

[1] the word "decision" in O. 49 r. 6(1) of the Subordinate Courts Rules 1980 does not refer to any ruling made in the cause of the trial and referred

to s. 3 of the Courts of Judicature Act 1964 to be read with s. 27 and s. 29 of the same Act. Section 3 under the heading interpretation defines the word "decision" as follows:

> "decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

Section 27 reads as follows:

> The appellate civil jurisdiction of the High Court shall consist of the hearing of appeals from Subordinate Courts as hereinafter provided.

Section 29 reads as follows:

> All civil appeals from a subordinate court shall be by way of re-hearing, and the High Court shall have the like powers and jurisdiction on the hearing of appeals as the Courts of Appeal has on the hearing of appeals from the High Court.

[2] he referred to s. 4 of the Courts of Judicature Act 1964 which reads as follows:

> In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail.

[3] the ruling by the learned magistrate on the preliminary objection does not finally dispose of the hearing of the civil action and the rights of the parties as the civil action has been scheduled for hearing;

[4] the decision made by the learned magistrate was only an interlocutory order and not a final order and he relied on a passage in *Ratnam v. Cumarasamy & Anor* [1962] 28 MLJ 330 at p. 332 which was laid down by Lord Alverstone CJ, the test for determining whether an order is final or interlocutory, wherein His Lordship said:

> I agree. It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

[5] he also referred to the decision of the Court of Appeal in *Saad Abas & Anor v. PP* [1998] 4 CLJ 575 wherein His Lordship Lamin Mohd Yunus PCA said *inter alia* that:

Whether it is a judgment, decision or order pronounced by a court, there must be an element of finality before there can be an appeal.

[6] Learned counsel for the plaintiffs further relied on the decision of the Court of Appeal in *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537. In that case, the appellant had applied for a bail in the High Court but bail was refused. The appellant then appealed to the Court of Appeal. The Court of Appeal refused bail. His Lordship Lamin Mohd Yunus PCA *inter alia,* said in referring to the new definition of the word decision as in the amended s. 3 of the Courts of Judicature Act 1964 which came into effect on 31 July 1998, that the order of the High Court in refusing to allow bail to the defendant is not appealable to the Court of Appeal as the decision (ruling) did not have the effect of finally determining the rights of the accused and said that only the outcome of the trial that would have the effect of finally disposing of his rights. His Lordship said:

This new definition of "decision", as in the amendment, does not include a judgment or order which does not deal with the final rights of the parties on the matters in dispute. In other words, what has been excluded from the meaning of the word "decision" is the type of judgments and orders which is termed "interlocutory" by *Halsbury's Laws of England,* 4th edn, vol 26, para 506, at p. 240, which reads:

Interlocutory Judgment

506. Interlocutory judgments and orders. An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'.

An interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.

Shortly stated, what the amendment means is that a judgment or order which does not deal with the final rights of the parties, but is made *pendente lite,* and gives no final decision on the matters in dispute, is not a "decision" within the meaning of that word in the current version of s. 3 Courts of Judicature Act, and therefore is not appealable. It makes no difference that such a judgment or order is final, that is to say conclusive, as to the subordinate matter with which it deals. For instance, an order granting or refusing bail is final (conclusive) as to the application with which it deals but it is still an order which does not deal with the final rights of the parties. Such an order is made before

judgment or sentence and gives no final decision on the matters in dispute. A judgment or order, even though not conclusive (final) of the main dispute, may be conclusive (final) as to the subordinate matter with which it deals. In this way, an interlocutory judgment or order may be conclusive (final) as to the subordinate matter with which it deals even though it is not conclusive (final) of the main dispute.

The real distinction is between, (for want of a better word) what is called, final judgments and orders and interlocutory judgments and orders. In general a judgment or order which determines the principal matter in question is termed "final": see *26 Halsbury's Laws of England, supra,* para 505, p. 238. Actually, the use of the term "final" is tautological as all judgments and orders are final. The term ("final") is used for the purpose of distinguishing between judgments and orders and "interlocutory" judgments and orders. The difference is that judgments and orders which are not termed "interlocutory" judgments and orders are appealable under the new meaning of the word "decision" as defined in s. 3 by the 1998 amendment. In other words, judgments and orders which determine the principal matter in question are termed "final" judgments and orders, and they are appealable. But, those judgments and orders which give no final decision on the matters in dispute (which are termed "interlocutory" judgments and orders) are now no longer appealable.

Final Judgment And Order

As for the definition of final judgment or order, *Halsbury's Laws of England, supra,* para 505 at p. 238-239 reads:

> 505. In general a judgment or order which determines the principal matter in question is termed "final". A final judgment has been defined as "a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established" and as "a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined in favour either of the plaintiff or of the defendant". A final order is none the less final by reason that it is subject to appeal, and a judgment may be final even though it directs inquiries, or deals with costs only, or is made on an interlocutory application, or reserves liberty to apply.

Decision Of High Court

It is the view of this court that in order to determine whether an order or decision is final, that order or decision must have determined the principal matter before the court thereby having concluded the main dispute and consequently, does not require further hearing or decision of the case to

be made by the court on the whole of the proceedings. In other words, the order or decision should not have dealt with the final rights of the parties on the subject matter in dispute which means, it is not conclusive of the main suit. In such a situation, the order or decision is not appealable within the meaning of the word "decision" as defined in s. 3 of the Courts of Judicature Act 1964.

On the other hand, if the order or decision finally dispose of the principle matter or the subject matter in dispute thereby bringing a conclusion to the whole of the proceedings without further date of hearing, it is the view of this court that the order or decision in those circumstances is appealable.

This court is also of the view that both the cases namely, *Saad Abas & Anor* and *Dato' Seri Anwar Ibrahim* although refers to criminal trials and appeals, the principal enunciated and applied in both those cases are directly relevant and applicable to the present appeal before this court as the word decision as defined in s. 3 of the Courts of Judicature Act 1964 refers to both criminal and civil cases.

In the appeal before this court, the decision or ruling made by the learned magistrate on the preliminary objection was not a final decision as it has only disposed of the preliminary objection thereby leaving scope for the parties to proceed with the hearing on the principal or main subject matter which will determine the rights of the parties in the civil action.

As the defendants have raised the issue of limitation in the statement of defence, the defendants have the right to rely on that plea of limitation when the case proceeds for hearing notwithstanding the decision of the learned magistrate on the preliminary objection which is only an interlocutory order and not a final order. Consequently, it is the view of this court that the doctrine of *res judicata* does not apply against the defendants as the learned magistrate has not heard the evidence on the merits and the defendants are entitled to raise once again the plea of limitation as part of the defendants' case during the trial.

Even if the learned magistrate has made a ruling on the issue of limitation based on the preliminary objection as to when the time starts on the breach for the purpose of determining the period of the limitation, whether on 13 November 1990 or 16 October 1995 which the learned magistrate cannot rightly do so, and which cannot stand in law because His Honour has not heard the evidence of the parties to the dispute on the merits of the case, this court is of the view that the defendants have still not lost their right

to raise once again that plea of limitation during the trial as pleaded in the statement of defence. If the learned magistrate has made a ruling as to the date when the breach had occurred, with respect, he would have erred in law as the date for the purpose of limitation could only be determined upon hearing the evidence and perusing the documents which has to be tendered and produced through proper legal process and put in formally not otherwise such as by having a sight of the letter dated 16 October 1995 as it was not properly before the court to be received as an admissible document and neither was there any evidence that the said letter was an agreed document (*Watson v. Ridwekk* [1879] 11 Ch D 150 CA).

This court is of the view that if a party is allowed to appeal against a ruling or decision made on a preliminary objection before the start of a trial or during the trial which decision does not determine or finally dispose of the rights of the parties as spelt out in s. 3 of the Court of Judicature Act 1954, the High Courts will be flooded with appeals and have to deal with those appeals as speedily as possible in order not to prolong the trial in the lower courts which will be pending the outcome of the decision of the appeal. If this situation is allowed to happen, the hearing of the cases in the lower courts will come to a standstill whereby it will result in the backlog of cases in the lower courts. It is fortunate that the new interpretation of the word "decision" in s. 3 of the Courts of Judicature Act 1964 has made it expressly clear and, by necessary implication, this court is of the view that the word "decision" in O. 49 r. 6 of the Subordinate Courts Rules 1980 does not apply to the decision made by the learned magistrate on the preliminary objection and on the facts of this case.

However, it is not inappropriate to state that if the decision of the learned magistrate had allowed the preliminary objection and which by necessary implication would have disposed of the plaintiffs' claim, the plaintiffs no doubt will have the right of appeal against the decision as that decision or ruling would have finally disposed of the plaintiffs' right to the claim thereby having denied the plaintiffs to proceed with the full hearing of their claim.

The crucial question on the plaintiffs' claim is: when did the plaintiffs' right to sue accrue for the agreed liquidated damages for the delay by the defendants in delivering vacant possession of the said house, whether on the date of the breach pursuant to the said agreement or pursuant to the date stated in the said letter dated 16 October 1995? As this is a question of construction of both the documents, this court is of the view that the

issue could only be determined as stated above on hearing formal evidence during the trial where both parties have the right to examine and cross-examine each other and their witnesses and not by having a sight of the document which has not been formally put in as an admissible evidence.

In the circumstances, the defendants appeal is dismissed with costs. This court is of the view that the appeal was unnecessary which as a result had caused the hearing of the main suit in the Magistrate's Court to be delayed indefinitely pending the outcome of this appeal.

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